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Supreme Court of the United States

OCTOBER TERM, 1962

No. 207

BRIDGEPORT ROLLING MILLS COMPANY,

Petitioner,

vs.

THEODORE ROOSEVELT BROWN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1962

No.

BRIDGEPORT ROLLING MILLS COMPANY,

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vs.

THEODORE ROOSEVELT BROWN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays for the issuance of a Writ of Certiorari to review the judgment below:

Award of arbitrator, Hon. Paul R. Hays, unreported, dated August 21, 1961 and Opinion (appended as Appendix "A").

Order of United States District Court, William H. Timbers, J., unreported, dated July 25, 1962 and Judgment, dated August 15, 1962 (appended as Appendix "B").

Opinion of United States Court of Appeals for the Second Circuit, reported 314 Fed. 2nd 885, dated March 15, 1963, and Judgment entered thereon, dated March 15, 1963 (appended as Appendix "C").

See: United States Arbitration Act (9 U.S.C. §10(a)) providing that a Court may vacate an award

> "procured by corruption, fraud or undue means . . ."

See: Federal Rules of Civil Procedure 60(b) providing that,

> "the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . .
>
> (2) newly discovered evidence which by due diligence would not have been discovered in time to move for a new trial under Rule 59b.
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

A. Questions Presented

The following questions of policy and law are of great and general importance:

1. When a contracting party to an arbitration agreement is guilty of fraud, should an award be confirmed or, if confirmed, may it be reopened?

2. May a Court under the United States Arbitration Act (9 U.S.C. §10(a)) vacate an award "procured by corruption, fraud or undue means" of a *party* to the arbitration as distinguished from the fraud or corruption of the arbitrator himself?

3. Where there is newly discovered evidence or evidence of fraud is newly available, is an arbitration award more final than a judgment (Federal Rules of Civil Procedure 60(b))?

4. May an employee's refusal to take a lie detector test coupled with other incriminating circumstances warrant an inference of guilt sufficient to support a discharge for cause?

B. Statement of the Case

This is a petition by an employer, who operates a small brass mill with 82 employees, to vacate an arbitration award in favor of a discharged employee who it claims was implicated in thefts of over $44,000 worth of copper and scrap metal from the employer's premises.

Most of the material was concealed in rubbish barrels which were removed from the plant and then salvaged. Some metal was removed in lunch baskets and in loose clothing. Although the employer was diligent, as the arbitrator's opinion attests, at the arbitration hearing only hearsay evidence of the crime was available plus the fact that the employee refused to take a lie detector or "polygraph" test. The case developed as per opinion of the arbitrator, the Honorable Paul R. Hays (Ap. A). Employee Brown, was not silent before the Arbitrator. Under oath he strongly asserted his complete innocence in the matter and this question was resolved in his favor as part of a single set of factual circumstances. The employer was directed to reinstate the employee with back wages now aggregating over $6,000.

Subsequently, new witnesses not previously known or discoverable by due diligence came forward and furnished eye witness testimony of the asportation and sale of some of the scrap metal by defendant employee, Theodore Roosevelt (Teddy)) Brown, as well as numerous admissions against interest by him as to the scope and character of his operations. (See statements of Ann Sue Neblett and James McDaniel).

Plaintiff applied to the Connecticut Superior Court to vacate the award. Defendant removed the case to the United States District Court. There the plaintiff moved to vacate the award:

(A) under the United States Arbitration Act 9 U.S.C. §10(a) as "procured by corruption, fraud or undue means . . .".

(B) under Federal Rules of Civil Procedure 60(b) by reason of "(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . ." and "(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party", and

(C) under the common law equity power of the court.

The district court took jurisdiction and (see Ap. B) asserted power "to vacate, correct or modify this arbitration award if it was procured by fraud". Its opinion stated that "if material perjured evidence had been furnished to the arbitrator by the prevailing party, that would constitute fraud sufficient to warrant setting aside the arbitrator's award", but it

failed to make a finding with respect to its conclusions in this respect.

The District Court also stated that "plaintiff, as the party asserting such perjury as fraud to upset the arbitration award, must show that the claimed newly discovered evidence relied upon to establish fraud, if received, would meet the requirements of (a) probative value normally expected in an arbitration proceeding and (b) being not discoverable or available to plaintiff in the exercise of due diligence during the arbitration proceedings". The court found that plaintiff failed to sustain the burden of complying with the requirements stated . . ." in (a) and (b) in this paragraph.

The District Court made no finding with respect to the refusal of the defendant Brown to take a lie detector test in conjunction with the newly discovered evidence or otherwise.

The United States Court of Appeals for the Second Circuit on March 15, 1963 affirmed the District Court per curiam without citation of authority (Opinion Ap. C). Since then a member of the scrap theft ring has signed a sworn statement under date of April 9, 1963 showing that he was an eye witness to its activities including pay-offs of the respondent, Theodore Roosevelt Brown.

C. Reasons for the Allowance of the Writ

1. There is very little federal law on arbitration matters and this case encompasses many important and some wholly new points.

2. Fraud of a party in the performance of a contract, including an arbitration contract, should vitiate the contract and permit an award under it to be reopened or set aside.

3. Where a union contract provides a standing procedure for arbitration, a referral back for proper reasons should be procedurally possible.

4. A lie detector (polygraph) test for employees should be available to employers under proper circumstances and refusal to take such should permit proper inferences when accompanied by supporting evidence.

5. It should be proper for a court to refuse to confirm an arbitration award under appropriate circumstances.

6. The arbitration process is no more final than the judicial process and should be subject to reopening and review under appropriate circumstances.

7. Arbitration awards should stand on the same footing as judgments where "under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of their term of entry. . . . Where the situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away." *Hazel-Atlas*

Glass Co. v. *Hartford Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *Marine Insurance Co.* v. *Hodgson*, 7 Cranch 332; *Marshall* v. *Holmes* 141 U.S. 589.

8. There is a split of authority as to whether false or perjured testimony (as distinguished from newly discovered evidence) is sufficient to set aside an arbitration award. Vermont, Georgia and New York take one view and Alabama and Connecticut another (*Lankton* v. *Scott*, 1787, Kirby (Conn.) 356, *Bulkley* v. *Starr*, 2 Day 552). (See 6 C. J. S. 248.)

9. It should be noted that the Connecticut arbitration statute (§52-418) and the New York arbitration statute (N.Y. Civil Practice Act, §1462), which antedate the federal arbitration statute and from which the federal statute was taken, are mandatory by their terms. The Connecticut statute says ". . . the superior court *shall* make an order vacating the award . . . if the award has been procured by corruption, fraud or undue means . . ." (emphasis supplied). The New York statute says, ". . . the court *must* make an order vacating the award . . . which . . . was procured by corruption, fraud or undue means." (emphasis supplied).

10. ". . . the decision of arbitrators can be upset if it was procured by fraud . . ." (*Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.* (USDC, NY 1959) 184 F. Supp. 116, aff. 274 F.2d 805, cert. den. 363 U.S. 843, 80 S. Ct. 1612).

11. Equity will relieve against an award obtained by fraud or unfair means (8 A.L.R. 1083). Fraudu-

lent concealment of facts or information from an arbitrator will also vitiate an award (8 A.L.R. 1087). The annotation at 8 A.L.R. 1088 observes that there are two cases to the contrary but states:

> "Relief will be granted in equity against an award obtained by the perjury of a party. *Chambers* v. *Crook* (1868) 42 Ala. 171, 94 Am. Dec. 637. (collection of a judgment enjoined); *Bulkley* v. *Starr* (1807) 2 Day (Conn.) 552 (award set aside); *Stufflebeam* v. *Allen* (1913) 184 Ill. App. 133 (award corrected); *Craft* v. *Thompson* (1872) 51 N.H. 536 (award set aside); *Fire Assoc. of Phila.* v. *Allesina* (1907) 49 Or. 316, 89 Pac. 960.
>
> "'An award based on fraud or false testimony of the prevailing party will be set aside in equity, in a suit instituted for that purpose, and he will be enjoined from maintaining an action thereon.'"

See also 6 *Corpus Juris Secundum* 247.

12. Newly discovered evidence is sufficient to warrant the sending back of an arbitration award for reconsideration (6 *Corpus Juris Secundum* 265).

Depew v. *Davis*, 2 Greene (Iowa) 260
Bolton v. *Gen'l Acc., Fire & Life Assur. Corp.* 51 N.Y.S. 2d 407, 409
Greene v. *Citizens Ins. Co.*, 18 Can. S.C. 338
Sprague v. *Allen*, 15 T.L.R. 150
Burnard v. *Wainright*, 19 L.J.Q.B. 423
In re Keighley, 1 Q.B. 405
6 *Corpus Juris Secundum*, *Arbitration* 265.
5 *Corpus Juris*, p. 209.

13. Concededly the equity powers of a court should not be lightly exercised or without adequate cause. However, such powers essentially exist to prevent a miscarriage of justice. The existence of fraud has always been recognized as an exception to the validity of a judgment or an arbitration award. It shocks the conscience. Defendant's position is obviously not good public policy or good law.

From the standpoint of the witness defendant Brown, this is a case of perjured testimony. Perjury, in, of and by itself, is sufficient to set aside an arbitration award (*Lankton* v. *Scott*, Kirby, Conn. 356, *Bulkley* v. *Starr*, 2 Day 552). In addition there is newly discovered evidence in this case.

From the standpoint of the arbitrator there is gross fraud. The arbitrator earnestly wrote as the crux of his opinion, ". . . . the absence of any direct evidence of Brown's implication in the theft requires the conclusion that Brown is a criminal of almost incredible cunning." Yet eye witnesses, numerous admissions, his refusal to cooperate with the employer and other substantial evidence confirms that defendant Brown was a criminal.

14. Arbitration machinery is still available under the contract and the American Arbitration Association is still capable of giving a new hearing in this matter. The union contract establishes a standing standard procedure for this. This proceeding is an appeal taken in a timely manner and in effect asks for a new trial. Plaintiff has reinforced its proof in a proper and timely fashion. The judgment in this case is still open. Even if it were not, a new trial could be timely given.

It is not a collateral attack upon the award. The United States Supreme Court held that an arbitration award could be recommitted in the case of *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 4 L.ed. 2d 1424, 80 S. Ct. 1358, 34 L.A. 569 (1969). Fairness, equity and sound public policy require that the award in this case be vacated and, if need be, that the matter be recommitted or referred back to the American Arbitration Association as a dispute requiring further attention under the disputes clause in the collective bargaining agreement between the parties or under 9 U.S.C. §10 which provides:

> "(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

Respectfully submitted,

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Counsel for Petitioner
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New Canaan, Connecticut 16

APPENDIX "A"

Award of Arbitration

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

UAW LOCAL 877

—and—

BRIDGEPORT ROLLING MILLS CO.

L-31025 Hart L-121-61

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

The discharge of T. R. Brown was not justified under the Agreement between the parties hereto.

The Employer shall offer Brown reinstatement to his former position and shall pay him an amount equal to the amount he would have earned if he had held such position during the period the discharge was in effect, less any amount he received during that period which he would not have received but for the discharge.

PAUL R. HAYS,
Arbitrator.

Dated: August 21, 1961

(Duly acknowledged)

Opinion of the Arbitrator

Brown was discharged on a charge of complicity in the theft of large amounts of copper from the plant.

The evidence of Brown's complicity consists of (1) the report of a conversation with a woman who represented herself to be the wife of one of the employees who was arrested for theft, and who stated that her husband had told her that Brown was implicated; (2) a reported statement of another employee who is alleged to have said that Brown was one of the participants in the theft; (3) Brown's fairly close association with the arrested employee on social occasions outside the plant; and (4) Brown's refusal to take a lie detector test.

This evidence is insufficient for reasons both affirmative and negative.

First, protection of the security of employment under an Agreement containing a just cause provision requires that some evidence other than mere rumor and gossip be presented to establish that such cause exists. No witness was produced who offered any direct testimony which in any way implicated Brown in the thefts. No opportunity was offered to test in any way the reports of statements by the two persons who were said to have sought to implicate Brown, although both were persons of doubtful reliability.

Second, the absence of any direct evidence of Brown's implication in the theft requires the conclusion that Brown is a criminal of almost incredible cunning. Over a period of months during which the Employer was aware of the theft and believed that there was reason to suspect Brown, and during which

Brown was under constant surveillance from an undercover agent, as well as from management, it was impossible to catch him in any overt move which provided even a basis for suspicion. Yet it is asked that we believe that during this period Brown was continuously engaged in a program of systematic theft on a large scale.

In the absence of any direct evidence connecting Brown with the theft of the Employer's property, the evidence of his refusal to take a lie detector test is insufficient. By the great weight of authority, both in arbitration and in the courts, even the results of such a test, when they are adverse to the person charged with a crime, are insufficient, at least where they are unsupported by other evidence.

The evidence as to the generally unsatisfactory character of Brown as an employee is wholly insufficient to justify his discharge. The incidents referred to are trivial in character, at least since 1953, and appear not to have been thought of as ground for any penalty until the Employer's suspicions as to the theft were aroused.

If the contractual protection for job security is to be given its intended effect, the discharge of Brown must be held to have been without justification.

PAUL R. HAYS.
Paul R. Hays,
Arbitrator

APPENDIX "B"

Order on (1) Plaintiff's Motion to Vacate Arbitration Award and (2) Defendants' Motion for Judgment on Record and Pleadings

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 8995.

BRIDGEPORT ROLLING MILLS COMPANY, a division of ATCO Chemical-Industrial Products, Inc., a Delaware Corporation

—v.—

THEODORE ROOSEVELT BROWN of Bridgeport, Connecticut,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA (UAW) and LOCAL UNION NO. 877 AFFILIATED WITH SUCH UNION

Plaintiff having moved to vacate an arbitration award entered August 21, 1961 by the Arbitrator (Honorable Paul R. Hayes) and defendants having moved for judgment on the record and the pleadings; and

The Court having heard argument by counsel for

the respective parties and having received and considered their pleadings, affidavits and briefs; and

The Court being of the opinion

(i) that it does have jurisdiction to vacate, correct or modify this arbitration award if it was procured by fraud (*Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 184 F. Supp. 116 (S.D.N.Y. 1959), *aff'd*, 274 F.2d 805 (2 Cir. 1960), *cert. denied*, 363 U.S. 843 (1960); 9 U.S.C. §10; Rule 60(b)(2) and (3), Fed. R. Civ. P.); and

(ii) that if material perjured evidence had been furnished to the arbitrator by the prevailing party, that would constitute fraud sufficient to warrant setting aside the arbitrator's award (*cf. Karppinen* v. *Karl Kiefer Mach. Co.*, 187 F.2d 32 (2 Cir. 1951)); and

(iii) that plaintiff, as the party asserting such perjury as fraud to upset the arbitration award, must show that the claimed newly discovered evidence relied upon to establish fraud, if received, would meet the requirements of (a) probative value normally expected in an arbitration proceeding and (b) being not discoverable or available to plaintiff in the exercise of due diligence during the arbitration proceedings (*cf. Karppinen* v. *Karl Kiefer Mach. Co.*, *supra* at 35; Rule 60(b)(2) and (3), Fed. R. Civ. P.); and

(iv) that plaintiff has failed to sustain the burden of complying with the requirements stated in paragraph (iii) above; it is

ORDERED that

(1) plaintiff's motion to vacate the arbitration award be, and the same hereby is, denied;

(2) defendants' motion for judgment on the record and the pleadings be, and the same hereby is, granted.

Dated at New Haven, Connecticut, this 25th day of July, 1962.

WILLIAM H. TIMBERS
William H. Timbers
United States District Judge

Judgment of District Court

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
Civil No. 8995

BRIDGEPORT ROLLING MILLS COMPANY, a division of ATCO Chemical-Industrial Products, Inc., a Delaware Corporation

—v.—

THEODORE ROOSEVELT BROWN of Bridgeport, Connecticut,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL WORKERS OF AMERICA (UAW) and LOCAL UNION No. 877 AFFILIATED WITH SUCH UNION

This case came on to be heard by the Court on defendants' motion for judgment on the record and the pleadings, and the Court having heard argument by counsel for the respective parties and having received and considered their pleadings, affidavits and briefs, and having granted said motion, now, therefore, it is

ORDERED, ADJUDGED and DECREED that plaintiff's application to vacate the arbitration award referred to in said application be, and the same hereby is, dismissed and that the defendants' recover their costs of action.

Dated at New Haven, Connecticut, this 15th day of August, 1962.

GILBERT C. EARL,
Clerk.

By THOMAS A. GRIMES
Chief Deputy Clerk

APPENDIX "C"

Opinion of Circuit Court of Appeals for the Second Circuit

No. 187—October Term, 1962

(Argued January 14, 1963 Decided March 15, 1963)

Docket No. 27805

BRIDGEPORT ROLLING MILLS COMPANY,
Plaintiff-Appellant,

v.

THEODORE ROOSEVELT BROWN et al.,
Defendant-Appellee.

Before:

MEDINA, WATERMAN, MOORE, *Circuit Judges.*

On appeal from the United States District Court for the District of Connecticut, Timbers, J., employer seeks to reverse the denial of its motion that Arbitrator's award be vacated. Affirmed.

Robert C. Bell, Jr., New Canaan, Connecticut, for Plaintiff-Appellant.

John A. Arcudi, Bridgeport, Connecticut, for Defendant-Appellee.

Per Curiam:

In the United States District Court for the District of Connecticut Bridgeport Rolling Mills Company moved to vacate a labor arbitration award adverse to it. The grounds for the motion were alleged to be those of newly discovered evidence, Rule 60(b) Fed. R. of Civ. P., and fraud in the procurement of the award. United States Arbitration Act, 9 U. S. C. §10(a). The employer filed affidavits in support of its motion. The employee then moved for judgment on the pleadings and the employer's affidavits. The employer's motion to vacate was denied. The employee's motion for judgment was granted. This appeal followed.

Under the arbitrator's award Bridgeport was ordered to reinstate with back pay an employee, Theodore Brown, who had been discharged under suspicion of complicity in the theft of materials from appellant's plant. The arbitrator, finding that the evidence offered against Brown in the arbitration proceeding consisted of "mere rumor and gossip", found that the employer to the employer's knowledge at the time of the discharge did not have just cause to discharge Brown.

Appellant, when it petitioned the district court to vacate the award, claimed to possess evidence uncovered after the arbitration award which conclusively established Brown's complicity, during his employment, in the thefts that then occurred, and alleged that Brown's testimony at the arbitration hearing, being perjurious, resulted in a fraudulent award. The trial judge held that the employer's affidavits failed to satisfy the employer's burden of proof. Upon oral argument before us appellant's counsel stated

that he was prepared to submit to us additional confirmatory information demonstrating Brown's complicity in the thefts and his perjury, which information had been obtained after the docketing of the appeal. That the employer at the time his motion was presented to the district court may have had, or may now have, sufficient evidence to justify a discharge of Brown for cause if he were now in the employer's employ is irrelevant to the issues the arbitrator heard and has no bearing upon the arbitrator's determination that the employer did not have just cause to discharge him in 1961. Brown's guilt, if now proved, does not require the conclusion that the arbitrator's award, when made, was procured by fraud, for the decision of the arbitrator was based upon the failure of the employer's proof to convince rather than on the strength of Brown's alleged perjurious testimony.

We do not imply by what we have said here that the employer cannot commence whatever actions it may be advised to pursue for the alleged conversion of its property—or to imply that, upon Brown's reinstatement, it may not, if so advised, forthwith discharge him for just cause. We only hold that the parties having agreed to an arbitration of their differences, are bound by the arbitration award made upon the testimony before the arbitrator.

We affirm the district court.

Judgment of Circuit Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of March one thousand nine hundred and sixty-three.

Present: HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

BRIDGEPORT ROLLING MILLS CO., a division of ATCO CHEMICAL-INDUSTRIAL PRODUCTS, INC.,
Plaintiff-Appellant.

v.

THEODORE ROOSEVELT BROWN, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT and AGRICULTURAL WORKERS OF AMERICA (UAW) and LOCAL UNION NO. 877 Affiliated with such Union,
Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed March 15, 1963

A. DANIEL FUSARO, Clerk